IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, Plaintiff,	§	
v.	§	Consolidated Lead No. H-01-3624 ✓
ENRON CORP., et al., Defendants.	§	
AMERICAN NATIONAL INSURANCE COMPANY, et al., Plaintiffs,	§	
vs.	§	Civil Action No. G-02-0299
J. P. MORGAN CHASE & COMPANY, Defendant.	§	

PLAINTIFFS, AMERICAN NATIONAL INSURANCE COMPANY, ET AL.'S RESPONSE TO JPMORGAN CHASE & CO.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

The American National Plaintiffs, American National Insurance Company, *et al.* ("American National" or "Plaintiffs"), file this Response to Defendant JPMorgan Chase & Company's ("JPM" or "Defendant") Motion to Dismiss First Amended Complaint ("Motion to Dismiss" or "Motion") subject to and without waiving their challenge to this Court's jurisdiction raised in American National's pending Motion for Reconsideration.

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OVERVIEW

American National asserts three causes of action against JPM under Texas law. Specifically, that JPM (1) aided and abetted Enron in violation of the Texas Securities Act; (2) violated section 27.01 of the Texas Business & Commerce Code (statutory fraud); and (3) is liable for fraud under the common law of Texas. JPM seeks dismissal of American National's entire action based upon (1) American National's purported failure to satisfy Federal Rule of Civil Procedure Rule 9(b)'s requirement that fraud be pleaded with particularity (*Motion* at 6-15); and (2) American National's purported failure to allege facts supporting each element of its claims such to avoid dismissal pursuant to Federal Rules of Civil Procedure 12(b)(6) (*Motion* at 15-19).

JPM's Motion to Dismiss is without merit because JPM does not and cannot show that any of the three causes of action asserted by American National are inadequately pleaded. American National alleges facts supporting each required element of each cause of action. The particular facts alleged are sufficient to support the fraud allegations, particularly in light of relaxed Rule 9 standard where, as here, the information is only within JPM's knowledge.

Lacking a legitimate basis for seeking dismissal, JPM resorts to conclusory allegations and improperly seeks to apply federal substantive law to American National's state law claims. Further and significantly, JPM fails to squarely address two of American National's causes of action even though JPM asks for dismissal of American National's entire case. JPM's Motion contains no discussion, whatsoever, of American National's statutory fraud claim. Similarly, although providing long-winded discussions concerning "primary violator" liability and "control person" liability, JPM fails to analyze the only section of the Texas Securities Act plainly applicable to JPM -- aider and abettor liability.

JPM's failure to analyze the statutory fraud and Texas Securities Act claims, and properly apply Texas substantive law in its analysis, is not mere oversight. The required proof for certain elements of American National's state law causes of action differ from those required for claims brought pursuant to federal securities laws. In particular, by misleading the Court that federal substantive law is applicable, JPM apparently hopes the Court will not recognize that a statutory fraud claim under section 27.01 of the Texas Business & Commerce Code does not include the scienter element required under federal law. Further, the aider and abettor claim under the Texas Securities Act has a much lower "state of mind" requirement than the scienter requisite under federal securities law.

In short, JPM's Motion to Dismiss is premised upon conclusory allegations and application of the wrong legal standards. The First Amended Complaint is adequate and not subject to dismissal under either Rule 9 or Rule 12 of the Federal Rules of Civil Procedure and American National asks the Court to deny JPM's Motion to Dismiss.

AMERICAN NATIONAL'S MOTION FOR RECONSIDERATION SHOULD BE DETERMINED PRIOR TO CONSIDERATION OF JPM'S MOTION TO DISMISS

It is well established that the initial question to be considered by a court is whether the court has jurisdiction to proceed. *See, e.g., Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574 (1999); *Clark v. Bever,* 139 U.S. 96 (1890). Where, as here, the Court has before it both a jurisdictional motion and another motion unrelated to jurisdiction "the first question for the Court is always jurisdiction." *American National Ins. Co. v. Travelers Casualty & Surety Co.*, 8 F.Supp.2d 938, 939 (S.D. Tex. 1998) (emphasis in the original). *See also, e.g., Wilson v. Consolidated Rail Corp.,* 732 F.Supp. 954, 955 (S.D.N.Y. 1990) (where motions to remand and to dismiss for failure to state a claim were

pending, the court determined that "because the court must be certain that federal jurisdiction is proper before entertaining a motion to dispose of the case on its merits, the remand motion is considered first.").

American National's Motion for Reconsideration of the Court's order denying remand is pending. American National, accordingly, requests that the Court rule on the Motion for Reconsideration prior to considering JPM's Motion to Dismiss.

STANDARD OF REVIEW

A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales, inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). Rule 9(b) motions to dismiss are treated in essence like Rule 12(b)(6) motions to dismiss for failure to state a claim. *See United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.,* 125 F.3d 899, 901 (5th Cir. 1997).

To survive a motion to dismiss, "the complaint must either contain direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio,* 43 F.3d 973, 975 (5th Cir. 1995). Rules 9(b) and 12(b)(6) must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim in federal court and calls for a "short and plain statement of the claim showing that the pleader is entitled to relief." *See Thrift v. Hubbard,* 44 F.3d 348, 356 n.13 (5th Cir. 1995). Thus, "the Federal Rules of Civil

Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." *Auster Oil & Gas v. Stream,* 764 F.2d 381, 386 (5th Cir. 1985).

American National's Amended Complaint alleges sufficient facts to put JPM on notice of the complained-of conduct. The Amended Complaint provides sufficient, particularized allegations for each element of its claims pointing directly to evidence, or for inferring that evidence will be uncovered during discovery, on all material points for presentation at trial.

AMERICAN NATIONAL ADEQUATELY PLEADS FRAUD

Rule 9(b) states that, "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The exact pleading requirements of Rule 9(b) are case-specific, but there are some essential core requirements that can be distilled from Fifth Circuit precedent. *Hernandez v. Ciba-Geigy Corp.,* 200 F.R.D. 285, 291 (S.D. Tex. 2001) (citing *Guidry v. Bank of LaPlace,* 954 F.2d 278, 288 (5th Cir. 1992)). In every case based on fraud, Rule 9(b) requires the plaintiff to allege the nature of the fraud, a brief sketch of how the fraudulent scheme operated, when and where it occurred, and the participants. *Id.* (citations omitted). American National's allegations satisfy Rule 9(b).

Nature of the Fraud

American National's Amended Complaint clearly alleges the nature of the fraud. JPM, for its own pecuniary gain, devised sham transactions, which allowed Enron Corporation to "cook" its books. *See Amended Complaint* ¶¶ 14, 18, 21, 44. As a result of JPM's financial shenanigans, Enron's consolidated financial statements materially misstated Enron's true financial condition. *Id.* ¶¶ 16, 44, 45. JPM aided and abetted Enron, and American National relied upon Enron's false financial reports. ¶¶ 55, 57, 60, 61. Despite its intimate knowledge of Enron's true financial

condition and participation in the scheme to cook Enron's books, JPM itself also made false statements and actionable omissions by promoting and creating a market for the purchase of Enron securities and by portraying Enron as a financially sound company in their recommendations to American National and other investors. *Id.* ¶¶ 23, 47.

How the Fraudulent Scheme Operated

American National provides details concerning how the scheme operated and specifies JPM's role in the scheme. JPM designed devices, in particular "forward sales contracts," which were in fact merely accounting gimmicks aimed at deceiving investors about Enron's true financial condition. *Id.* ¶¶ 14, 35, 44. JPM also controlled a corporate entity, Mahonia, Ltd., for implementing the sham transactions. *Id.* ¶¶ 19-22. The forward sales transactions, which on their face appeared to be legitimate oil and gas sales transactions, were in fact disguised loans and had the effect of "improving" Enron's reported financial condition. *Id.* ¶¶ 44-47.

The Who, What, When, Where

There were two distinct aspects to the fraudulent scheme. First, and the basis for American National's aider and abettor claim, was the series of Enron-JPM sham transaction, which allowed Enron to falsify its reported financial condition. Second, and the basis for American National's fraud causes of action, was JPM's own knowing misstatements and mischaracterizations of Enron's financial condition and JPM's recommendations based upon its own misstatements and mischaracterizations. These false statements, of course, were need to inflate Enron's equity prices such to implement the Mahonia sham transactions.

The Amended Complaint provides details concerning some of the acts comprising JPM's fraudulent course of conduct. JPM entered into six separate agreements during the period 1998

through 2001 denominated as "forward sales contracts" which purported to provide for the delivery of crude oil and natural gas over a 4-5 year period with Mahonia as purchaser. *Id.* ¶ 31. JPM concealed from the public that Mahonia was a special entity completely controlled by JPM. *Id.* ¶29. The function of Mahonia and the sham transactions was to allow Enron to report excellent – but false – year-end financial results and thus inflate the price of Enron stock. *Id.* ¶¶ 19-28.

American National cites the evidence that led a court in the Southern District of New York to conclude "the net effect was simply a series of loans from Chase to Enron; but by disguising them as sales of assets, Enron could book them as revenue." *Id.* ¶ 46. *See Id.* ¶¶ 27-45 (describing details of the scheme). JPM, of course, did not want to assume the risk of these transactions, and thus purchased insurance as a hedge. *Id.* ¶ 36. The insurance companies have refused to pay JPM's claims because these were sham transactions.

As if JPM's complicity in the scheme to "cook" Enron's books were not enough,[1] JPM simultaneously and continuously recommended to American National and other investors the purchase of Enron securities, presumably based upon the false Enron financial statements JPM helped to create. ¶¶ 47, 48. American National provides the who, when and where the misstatements were made. The Amended Complaint lists the dates of deceptive reports, promulgated by JPM institutional and retail brokerage offices throughout the country, some of which were relied upon by the American National Plaintiffs in Galveston County when deciding to purchase, and deciding to hold rather than sell, Enron securities. ¶ 47, 51, 52. JPM tenders copies of two of these reports as exhibits to its Motion to Dismiss. Clearly the reports omitted material information, known to JPM, that Enron's financial statements were false because of the sham business entity and sham

1 Such complicity is enough for liability as an aider and abettor under the Texas Securities Act.

transactions devised by JPM for Enron. On information and belief, JPM knew Enron was booking the forward sales transactions improperly as asset sales while JPM internally booked the same transactions as loans.

Amazingly, JPM kept portraying Enron as a well managed, financially sound company even as Enron was descending into bankruptcy. *Id.* ¶¶ 47, 48. Thus, whatever excuse JPM may devise for explaining why it failed to reveal the sham transactions at the time they were made, American National makes allegations sufficient for stating a claim of fraudulent concealment or omission because JPM never corrected the earlier statements by explaining that they were false or misleading. *Id.* ¶¶ 50, 55, 62.

JPM's Rule 9(b) Objections to American National's Pleading

JPM argues that Rule 9(b) is not satisfied because (1) Plaintiffs' allegation of reliance on JPM's "buy" recommendations and other positive statements about Enron is "wholly conclusory" (*Motion* at 2); (2) Plaintiffs do not allege when, where, from whom and at what price the Enron securities were purchased (*Motion* at 3, 12); (3) the alleged misstatements or misrepresentations made by JPM are not specified (Motion at 3-4, 12); and (4) no facts are alleged concerning JPM's knowledge or intent to commit fraud upon Plaintiffs (*Motion* at 10-12). A review of the Amended Complaint under the applicable legal standards, however, makes clear that **none** of JPM's Rule 9(b) challenges has merit and that JPM's claimed entitlement to dismissal pursuant to Rule 9(b) cannot be sustained.

American National Adequately Pleads Reliance

JPM declares that American National's wholly conclusory allegations of reliance on JPM's "buy" recommendations and other positive statements made by JPM "underscores the insufficiency

of Plaintiffs' claims against JPMorgan Chase." *Motion* at 2. Authority cited by JPM, however, explains why American National's allegations are adequate under Rule 9(b). *See In re Compaq Sec. Litig.*, 848 F.Supp.1307 (S.D. Tex. 1993). In *Compaq,* the complaint's allegation of reliance consisted solely of the statement, "Plaintiffs and other members of the Class relied to their detriment on those false representations in entering into those contracts." *Id.* at 1312 n.10. The defendant objected that the complaint "only states a conclusion that actual reliance existed." *Id.* at 1312. In finding that the plaintiffs' allegations passed review under Rule 9(b), the court noted, "[W]hile . . . plaintiff's allegations of reliance are conclusory, this is inherently true of reliance allegations. One either relies on a particular statement or one does not, there is no middle ground." *Id.*

The Amended Complaint makes clear that American National purchased and held Enron securities based upon Enron's false financial reports (made false with the aid of JPM), and upon JPM's own misrepresentations and mischaracterizations of Enron. *See, e.g., Amended Complaint* ¶¶ 14, 16, 50, 52, 53. As noted by the Fifth Circuit Court of Appeals, "To foster a high degree of scrupulousness in the once sordid securities industry, both Congress and the Texas legislature deliberately relieved securities purchasers of the difficult burden of proving subjective reliance." *Haralson v. E.F. Hutton Group, Inc.,* 919 F.2d 1014, 1032 (5th Cir. 1990) (citation omitted). JPM's contention that American National's "reliance" allegation is inadequate should, accordingly, be rejected.

JPM moreover ignores that a cause of action pursuant to section 33(F)(2) of the Texas Securities Act, the aider and abettor provision, does not even require that American National rely upon statements made by JPM. Rather, the aider and abettor claim is based upon JPM's conduct which aided and abetted Enron in its falsification of Enron's financial reports -- reports which were

relied upon by American National in their purchase of Enron stock, bonds, preferred stock and commercial paper. *Id.* ¶ 14, 44, 45, 53, 57. Essentially, 33(F)(2) is a conspiracy statute, and American National is only required to show that this conspiracy wrongfully caused it harm.

American National Adequately Pleads Purchase of Enron Securities

JPM's contention that American National must plead "when, where, from whom and at what price" the American National Plaintiffs purchased Enron securities is likewise without merit. American National does not allege that it purchased securities directly from JPM; American National rather alleges that JPM's aiding and abetting Enron's fraud, and JPM's untrue statements about Enron's financial condition, were the fraud-related acts which caused American National harm. These fraud-related acts are pleaded with particularity.

Plainly JPM will be entitled during the discovery process to information concerning the dates of purchase, the prices, and other similar information concerning the American National Plaintiffs' purchases of Enron securities. Rule 9(b), however, is not implicated.

American National Adequately Pleads Enron's and/or JPM's Misrepresentations

JPM next contends that American National does not explain the "time, place and the contents of the false representations, as well as the identity of the person making the misrepresentations and what [that person] obtained thereby."[2] *Motion* at 10 (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997)). JPM also contends that American National's references to analyst reports are not properly considered allegations of JPM's misrepresentations because (1) the reports were generated by a JPM subsidiary called "JPMSI" and (2) American National does not specify the who, what and where of the reports. That the reports were prepared by an entity called JPMSI is

2 JPM does not challenge the sufficiency of American National's allegations concerning the sham JPM-Enron deals.

inapposite because JPM promulgated the reports under its own name and through its own broker network. Moreover, according to JPM, JPMSI became part of JPM. Because JPM does not establish as a matter of law that JPM cannot be liable for conduct of JPMSI, the question of JPM's liability for JPMSI's conduct is not properly raised in a motion to dismiss. In the event it is necessary, American National will move to add JPMSI as a party to this lawsuit.

In any event, American National alleges and lists the dates that JPM's institutional and retail investment advisors "issued" the reports recommending the purchase of Enron securities and portraying Enron as a financially solid, well-managed company, despite JPM's knowledge that the statements concerning Enron's financial condition were false. *Amended Complaint* ¶ 47. American National also alleges it received the reports in Galveston County, Texas. *Id.* ¶ 51. The name of the analyst or author of the report is not material because JPM adopted the reports and wrongfully omitted to include facts that would have made the statements true.

In what appears to be an attempted merits defense rather than a challenge to the sufficiency of the pleadings under Rule 9(b), JPM also contends that the analyst reports and "buy" recommendations were merely publicly available information about Enron and the analysts' personal opinions." *Motion* at 2. *See also Motion* at 4-5. But this is exactly the point raised in this lawsuit; JPM wrongfully *omitted* material information which it had in its possession and which made the reports intentionally misrepresent the state of affairs at Enron.[3]

JPM's entire diatribe berating American National for failing to identify the who, what, where and when of the particular fraudulent statements misses the mark because this is a case of fraudulent

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3 Any attempt by JPM to argue that these reports were merely "opinions" is spurious. Although ordinary expression of opinion by lay people are not actionable, where the speaker has special knowledge of the facts, these expressions of opinion, if false, are actionable. *Fina Supply, Inc. v. Abilene Nat'l Bank,* 726 S.W.2d 537, 540 (Tex. 1987); *Trenholm v. Ratcliff,* 646 S.W.2d 927, 930 (Tex. 1980); *Texas Indus. Trust v. Lusk,* 312 S.W.2d 324, 326 (Tex. Civ.

omission. JPM participated in creating "off-the-book" transactions to allow Enron to falsify its reported financial condition; JPM therefore knew that Enron's books had been cooked. *See Amended Complaint* ¶¶ 14, 16, 21-23, 27, 31-34, 40, 41-45. JPM made numerous statements that omitted material facts that were necessary to make the statements true. *Id.* ¶ 47. In fact, JPM *never* disclosed the whole truth so that the statements already made would not convey a false impression. *Id.* ¶ 48.

An omission may be misleading if it renders the reported information misleading. *Netsolve,* 185 F.Supp.2d at 693 (citing *Gross v. Summa Four, Inc.*, 93 F.3d 987, 992 (1st Cir. 1996); *Karacand v. Edwards,* 53 F.Supp.2d 1236, 1243-44 (D. Utah 1999)). As JPM concedes, a duty to speak arises as a matter of law if a party learns later that his previous affirmative statement to another party was false or misleading, or, a party voluntarily discloses to the other party some but less than all material facts, so that he must disclose the whole truth lest his partial disclosure convey a false impression. *Motion* at 18 (citing *Union Pac. Res. Group, Inc. v. Rhone-Poulenc, Inc.*, 247 F.3d 574, 586 (5th Cir. 2001)). In rejecting an argument similar to JPM's, a Western District of Texas district court held:

> [Defendant] claims the plaintiffs "do not even attempt" to allege how the information in the July 5, 2000 analyst report was misleading, and fail to properly allege that the information was provided by defendants. Once again, the defendants ignore the plaintiffs' contention that the July 5, 2000 analyst report, like the other challenged statements, was misleading because it *omitted* [Defendant's] four purported problems.

In re Netsolve, Inc. Sec. Litig., 185 F.Supp.2d 684, 694-95 (W.D. Tex. 2001) (emphasis in original)

It is well established that Rule 9(b)'s particularity requirement should be relaxed where the information is only within the opposing party's knowledge. *See Wool v. Tandem Computers, Inc.*, 818 F.2d. 1433, 1439 (9th Cir. 1987); *Schilk v. Penn-Dixie Cement Corp.*, 507 F.2d. 374, 379 (2d

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App. – San Antonio 1958, writ ref'd).

Cir. 1974), *cert. denied*, 95 S.Ct. 1976 (1975). "If the information surrounding the allegations is peculiarly within the knowledge of the defendant, less detail is required in the complaint." *The Cadle Co. v. Schultz,* 779 F.Supp. 392, 396 (N.D. Tex. 1991). Courts recognize that "in cases of corporate fraud, plaintiffs cannot be expected to have personal knowledge of the details of corporate internal affairs" *See Shapiro v. UJB Financial Corp.,* 964 F.2d 272, 284-85 (3d Cir.), *cert. denied,* 506 U.S. 934 (1992) (citations omitted) (also noting that, where the facts are in the exclusive possession of the adversary, court should permit the pleader to allege the facts on information and belief, provided a statements of the facts upon which the belief is found is proffered).

The degree of particularity required, furthermore, should be determined in light of the progress of discovery. *See Devaney v. Chester,* 813 F.2d 566, 569 (2d Cir. 1987). Although a plaintiff must provide more than mere conclusory allegations of fraud, "it is a principle of basic fairness that a plaintiff should have an opportunity to flesh out her claim through evidence unturned in discovery. Rule 9(b) does not require omniscience; rather, the Rule requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to the nature of the claim." *Michaels Bldg. Co. v. Ameritrust Co.*, 848 F.2d 674, 680 (6th Cir. 1988).

In the instant case, the relevant information is in the possession and under the control of JPM and discovery has not yet commenced. Particularly in light of these case-specific factors, the Amended Complaint provides more than sufficient details concerning the "who, what, when and where" of the acts which comprise the fraudulent course of conduct to satisfy Rule 9(b) and to adequately notify JPM of the claims such as to permit a response. *See, e.g., Primavera Familienstiftung v. Askin,* 173 F.R.D. 115, 128 (S.D.N.Y. 1997).

American National Adequately Pleads JPM's State of Mind

JPM's objection to American National's "failure to plead scienter with particularity" is without merit. "Scienter ('malice, intent, knowledge and other conditions of mind') is explicitly permitted to be averred generally by Rule 9(b) and is satisfied where, as here, plaintiffs allege defendants had actual knowledge of the materially false and misleading statements or omissions and acted with reckless disregard for the truth." *In re Chambers Development Sec. Litig.*, 848 F.Supp. 602, 620 (W.D. Pa. 1994); Fed. R. Civ. P. (b) ("malice intent, knowledge, and other conditions of mind of a person may be averred generally").

Moreover, "while it is true that Texas courts have not used the words 'reason to expect' when discussing fraud's intent element, a defendant who acts with knowledge that a result will follow is considered to intend the result." *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 579 (Tex. 2001). American National pleads facts alleging JPM possessed knowledge that the sham transactions had the effect of making Enron's reported financial statements untrue. *See Amended Complaint* ¶¶ 14, 16-18, 21-23.

Under the Rule 9(b) Standard, American National's Action Should Not Be Dismissed

The application of the Rule 9(b) standard is flexible and depends upon the particular circumstances of the litigation at bar. *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993). The Court's interpretation of Rule 9(b) is to be harmonized with the general principles of Federal Rule of Civil Procedure 8 which requires only that a complaint give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Cadle Co.*, 779 F.Supp. at 396 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Furthermore, the Fifth Circuit has recognized that a

relaxed pleading was appropriate, "allowing fraud to be pled on information and belief where, as here, the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F.Supp.2d 1017, 1039 (S.D. Tex. 1998).

Courts have consistently found that where allegation of fraudulent conduct are numerous or take place over an extended period of time, less specificity is required to satisfy the pleading requirements of Rule 9(b). *Id.* (citing cases). American National pleads a fraudulent course of conduct, alleging numerous instances of fraudulent activity over an extended period of time. JPM plainly has notice of the complained-of conduct and the instances of fraudulent conduct are pled with the requisite particularity.

In sum, American National sufficiently alleged particularized facts which raise the inference of fraud. American National has both explained JPM's motive. *See Amended Complaint* ¶ 18 (JPM received large underwriting, consulting and management fees in addition to interest on loans); ¶¶ 18,49 (JPM executives personally were able to profit from the fraud). American National also explains circumstances indicative of conscious behavior. *See Id.* ¶¶ 16-17, 19-46 (devising sham transactions with knowledge that they deceived investors); ¶¶ 18, 47-53 (characterizing Enron as a financially sound company and recommending the purchase of Enron securities while omitting to reveal information about sham transactions which materially affected Enron's reported financial condition). American National's Amended Complaint, accordingly, should not be dismissed.

AMERICAN NATIONAL PLEADS ALL THE ELEMENTS OF THE CLAIMS

JPM's failure to analyze each of American National's claims is conspicuous by its absence. JPM devotes several pages of its Motion to citing the elements of each claim. *Motion* at 6-9. There

is, however, no follow-up discussion specifying which elements American National purportedly has not pleaded such to allow dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). JPM does not and cannot point to any defects in the pleading that warrants Rule 12(b)(6) dismissal because American National adequately pleads each element of each claim.

Statutory Fraud

To prevail on its statutory fraud cause of action under section 27.01 of the Texas Business & Commerce Code, American National must show that (1) the defendant made a material misrepresentation (2) which was false, (3) that the defendant intended the plaintiffs act upon the representation and (4) the plaintiffs acted upon the representation. *Brush v. Reata Oil and Gas Corp.,* 984 S.W.2d 720, 726 (Tex. App. – Waco 1998, pet. denied) (citing *Swanson v. Schlumberger Technology Corp.,* 895 S.W.2d 719, 732 (Tex. App. – Texarkana 1994), *rev'd on other grounds,* 959 S.W.2d 171 (Tex. 1997); *Diversified, Inc. v. Walker,* 702 S.W.2d 717, 723 (Tex. App. – Houston [1st Dist.] 1985, writ ref'd n.r.e.)).

JPM virtually ignores American National's statutory fraud claim. JPM merely quotes the statute and cites a single case with a parenthetical, "subjecting Plaintiff's allegations under § 27.01 of the Texas Business and Commerce Code and the Texas Securities Act to scrutiny under 9(b))." *Motion* at 6-7, 10 (citing *In re Compaq Sec. Litig.,* 848 F.Supp. 1307, 1312 (S.D. Tex. 1992)). That JPM does not squarely address American National's statutory fraud claim is not surprising given that one of JPM's primary arguments for dismissal is American National's purported failure to plead scienter. A claim under section 27.01, however, does not require proof of knowledge or recklessness as a prerequisite for a finding of liability and the recovery of actual damages. *Brush,* 984 S.W.2d at

726. Only the reliance and materiality elements, accordingly, must be examined with reference to Rule 9(b). *See Compaq Sec. Litig.*, 848 F.Supp. at 1312-13.

American National alleges facts supporting each element of its statutory fraud claim. JPM made misrepresentations and actionable omissions concerning Enron's financial condition by portraying Enron as a financially sound, well-managed company but failing to disclose the "off-the-books" transactions that had the effect of concealing Enron's debt and making Enron's reported financial condition false. *See Amended Complaint* ¶¶ 16, 21, 26, 47. Courts have applied an objective standard holding that an omission or misrepresentation is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding to invest. *Granader v. McBee,* 23 F.3d 120, 123 (5th Cir. 1994); *Anheuser-Bush Companies v. Summit Coffee Co.*, 858 S.W.2d 936 (Tex. App. – Dallas 1993, writ denied). In its Motion, JPM does not argue that the artificial inflation of a stock's price would, as a matter of law, not be material.

The materiality factor is likewise met under the federal standard. An omitted fact is material if there is a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable investor. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 499 (1976). "In other words, the issue is whether there is a substantial likelihood that the disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information available to that investor." *Shapiro*, 964 F.2d at 281 (citation omitted). Only if the alleged misrepresentations or omissions are so obviously unimportant to an investor that reasonable minds could not differ on the question of materiality is it appropriate for the district court to rule that the allegations are inactionable as a matter of law. *Id.*

JPM's "buy" recommendations evidence JPM's intent for American National and other investors to rely upon the misrepresentations and omissions and American National has stated that it relied upon JPM's recommendations. *See Id.* ¶¶ 47, 48. *See also Haralson, supra.* American National, accordingly, has sufficiently alleged the elements of its statutory fraud claim.

"Aider and Abettor" Under the Texas Securities Act

Section 33(F)(2) of the Texas Securities Act provides:

> A person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable . . . jointly and severally with the seller, buyer or issuer and to the same extent as if he were the seller, buyer or issuer.

An aider and abettor is liable absent any fiduciary or other independent duty to disclose. In *Frank v. Bear Stearns*, the Fourteenth Court of Appeals analyzed the aider and abettor provision of the Texas Securities Act and held:

> In order to establish liability under this standard, a plaintiff must demonstrate 1) that a primary violation of the securities laws occurred; 2) that the alleged aider "had general awareness" of its role in this violation; and 3) that the alleged aider either a) intended to deceive plaintiff or b) acted with reckless disregard for the truth of the representations made by the primary violator.

Frank v. Bear Stearns & Co., 11 S.W.3d 380, 384 (Tex. App. – Houston [14th Dist.] 2000, *pet. denied*).

American National's Amended Complaint sets forth each of the elements required to maintain a cause of action under the aiders and abettors provision of the Texas Blue Sky law. As a publicly traded company, Enron issued its own stock and violated securities laws by falsifying its financial reports. *See Amended Complaint* ¶ 51. JPM knew of, and participated in, the concealment

of debt for the purpose of allowing Enron, the "primary violator", to "cook" its books so as to inflate the value of Enron equities. *See, e.g., Id.* ¶¶ 14, 16, 19-23. Further, JPM at the least acted with reckless disregard for the effects of its part in cooking Enron's books by failing to disclose, at any time before (or, for that matter, even after) Enron's bankruptcy, its knowledge of and participation in the sham transactions. *See Id.* ¶¶47, 48. American National, accordingly, provides factual allegations supporting each element of its aider and abettor cause of action under the Texas Securities Act.

JPM contends that American National's allegations are inadequate because they do not meet the high scienter standard prescribed by the federal Securities Litigation Reform Act. *See Motion* at 10-12. The threshold under the Texas Securities Act for demonstrating scienter, however, is not high. "The Texas Securities Act recognizes on its face that recklessness satisfies the scienter requirement for aider and abettor liability." *Akin v. Q-L Investments, Inc.*, 959 F.2d 521, 532 (5th Cir. 1992). To demonstrate reckless conduct under the Texas Securities Act, a plaintiff need only show that the defendant had a "general awareness" of the violation and acted with reckless disregard for the truth of the representations. *Frank,* 11 S.W.3d at 384. JPM's generalized and unsubstantiated contention that American National fails to adequately plead JPM's liability for aider and abettor liability under the Texas Securities Act must be rejected.

Common Law Fraud

To prevail on a common law fraud claim, a plaintiff must prove that the defendant (1) made a misstatement or omission (2) of material fact (3) with the intent to defraud (4) on which the plaintiff relied and (5) which proximately caused injury to the plaintiff. *Hernandez v. Ciba-Geigy Corp. USA,* 200 F.R.D. 285, 291 (S.D. Tex. 2001). The elements of common law fraud, therefore, are the

same as those of statutory fraud, with the addition of a scienter element. *See Brush,* 984 S.W.2d at 726. As demonstrated in the discussion of American National's statutory fraud claim, *supra*, the elements common to statutory and common law fraud claims are adequately pleaded.

The "intent to deceive" element is also met. A party's intent, although determined at the time the party made the representation, may be inferred from the party's subsequent acts after making the representation. *Spoljaric v. Percival Tours, Inc.,* 708 S.W.2d 432, 434 (Tex. 1986). Intent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given to their testimony. *Id.* Because intent to defraud is not susceptible to direct proof, it must therefore be proven by circumstantial evidence. *Id.* at 435.

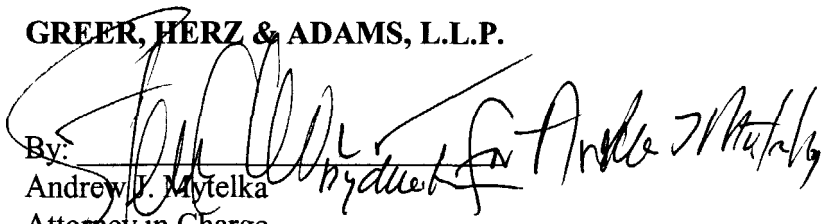
The numerous allegations concerning JPM's involvement in Enron's cooking of its books, followed by JPM's misrepresentations about Enron's financial condition and JPM's strong recommendations to purchase Enron securities adequately plead JPM's intent to deceive. *See Amended Complaint,* ¶¶ 17-47, 50-52, *Id.* ¶ 48. JP M's failure to *ever* admit that its characterization of Enron's financial condition omitted material facts further confirms fraudulent intent. *See Amended Complaint,* ¶¶ 17-47, 50-52, *Id.* ¶ 48. Because American National sufficiently pleads all elements of its common law fraud claim, JPM's Rule 12(b)(6) request to dismiss the claim should be denied.

PRAYER

JPM fails to meet its burden of demonstrating that any of American National's claims should be dismissed under either Rule 9 or Rule 12. American National, accordingly, asks the Court to deny JPM's Motion to Dismiss First Amended Complaint.

Respectfully submitted,

GREER, HERZ & ADAMS, L.L.P.

By: 
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CERTIFICATE OF SERVICE

I certify that a copy of this motion was served on counsel for J.P Morgan Chase & Company via U.S. mail and posted upon the els website in accordance with the Court's instructions on September 17th, 2002.

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